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No. 88-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUN-TEK INDUSTRIES, INC.,
Petitioner,

v.

KENNEDY SKY-LITES, INC. and KENERGY CORPORATION,
Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Whether a district court may reverse the part of a final judgment wherein it expressly held the action before it was not an exceptional case under 35 U.S.C. §285 when the party who sought to reverse the judgment served a motion more than ten days after entry of the final judgment based on 28 U.S.C. §§1920, 1927, 35 U.S.C. §285, and Fed. R. Civ. P. 11 and 54, which motion the court did not deem to come within Rule 60.

Whether the court of appeals, after finding no case or controversy existing between the parties on appeal that would require a decision on the enforceability or validity of patents, properly dismissed the appeal as moot and vacated the relevant portion of the district court's judgment.

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STATEMENT OF THE CASE

The Petitioner initiated this suit against Respondents[1] seeking a Declaratory Judgment that certain patents for which it held a non-exclusive license were invalid and unenforceable. Petitioner sought other relief including antitrust remedies which were not relevant to the appeal below in this case. Respondents asserted a counterclaim against Petitioner for patent infringement. Following Petitioner's case in chief, the trial court granted a directed verdict in favor of Respondents on some issues, including the antitrust claims. After trial, the jury found that the '414 patent was obvious, that Respondents committed fraud with respect to the '414 patent, that certain claims of the '776 and '200 patents were valid and the remainder invalid.

On October 17, 1986, the trial court entered a Final Judgment as to all issues. The Final Judgment confirmed the directed verdict and the jury verdict. The court found that the '261, '776 and '200 patents were invalid for fraud in the procurement of related '414 patent. In addition, the court found this was "not an exceptional case under 35 USC §285." (Petitioner's app. p. 74a).[2] Respondents timely filed post judgment motions for Judgment Notwithstanding the Verdict, for a New Trial, for Reconsideration, Rehearing and/

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[1] In accordance with Rule 28.1, Respondents state: Kennedy Sky-Lites, Inc. is a subsidiary of Kenergy Corporation; Kenergy Corporation and Kennedy Sky-Lites, Inc. have no other parent companies, subsidiaries or affiliates.

[2] All appendix references are to Petitioner's appendix.

or Amendment to the Judgment as to certain Non-Jury Issues, and for Attorney's Fees.[3]

On November 5, 1986, more than ten days after the judgment, Petitioner filed a Motion and Memorandum for Attorneys' Fees and Costs under 35 U.S.C. §285, Fed. R. Civ. P. 11 and 54, and 28 U.S.C. §§1920 and 1927. On March 3, 1987 the district court issued an Amended Final Judgment wherein it reversed its ruling regarding exceptional case[4] and pursuant to that reversal awarded $447,716.37 to Petitioner for attorneys' fees. (app. p. 105a). On March 12, 1987, Respondents filed a Motion for Rehearing, Reconsideration and Amendment as to the Amended Final Judgment. On March 18, 1987, the trial court ordered Petitioner to submit additional documentation in support of its attorneys' fees request. On May 21, 1987, the trial court entered a judgment prepared by Petitioner's counsel awarding attorneys' fees in the amount of $482,759.11. (app. p. 113a).

Respondents filed a Notice of Appeal on May 18, 1987 with respect to the March 3, 1987 Amended Final Judgment, which was assigned Appeal No. 87-1375. Following the May 21, 1987 Order on Attorneys' Fees, a second appeal, No. 87-1421, was filed. The appellate court consolidated the two appeals. The appeal was briefed and oral argument was heard on December 2, 1987.

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[3] Respondents' attorneys' fees motion was based on Petitioner's failure to present a justiciable issue in its antitrust claims.

[4] Petitioner claims that the Federal Circuit has decided that a "finding of exceptional case may be made at any time." (Petition p. 16). Petitioner fails to cite any case to support this statement, and none exists.

The appellate court issued a judgment in favor of Respondents on June 6, 1988, reversing and vacating that portion of the district court's Amended Final Judgment awarding attorneys' fees to Petitioner. (app. p. 114a). The appellate court recognized a district court's power to act *sua sponte* to alter or amend a judgment under Fed. R. Civ. P. 59(e) as long as it acted within the ten-day time limit.

The appellate court ruled that "a district court is without authority to alter or amend a judgment which is not subject to a timely motion under Rule 59(e)." 848 F.2d 179, 182. In dicta, the Court stated that it did not "consider the district court's action herein, nor did the Court so indicate or the parties contend, to fall within other provisions of Rule 59 or Rule 60." (app. p. 128a).

The appellate court also dismissed as moot Respondents' appeal requesting review of the enforceability and validity of the four patents at issue. The appellate court pointed out that because Petitioner did not infringe the patents, the appellate court would be rendering an opinion where no case or controversy existed as to the enforceability or validity of those patents. Since it could not review the district court's rulings on enforceability or validity, the appellate court vacated that portion of the district court's judgment respecting enforceability and validity. Petitioner's Request for Rehearing and Suggestion for Rehearing En Banc were denied by the court of appeals.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF ARGUMENT.

No special or important reasons exist for granting the petition. Petitioner did not argue before the appellate court below, nor has it ever contended before filing its petition, that its Motion and Memorandum for Attorney's Fees under 35 U.S.C. §285, Fed. R. Civ. P. 11 and 54, and 28 U.S.C. §§1920 and 1917, could possibly be construed as a Rule 60(b) Motion. Petitioner admits that it filed its Motion nineteen (19) days after entry of the Final Judgment rendered October 17, 1986; as a matter of law, Petitioner's Motion was untimely under Rule 59(e).

Although the Petitioner, in an effort to create an issue for certiorari, misstates the holdings of several of the cases, the Petition still fails to explain the conflict claimed to exist between the appellate court below and other Federal courts. No conflict exists among the federal courts regarding the application of Rules 59 and 60 or the application of the concept of mootness. The relevant case law, including that cited by Petitioner, does not support Petitioner's allegations of conflict.

II. THE APPELLATE COURT'S DECISION IS CONSISTENT WITH ALL OTHER FEDERAL COURTS OF APPEALS AND WITH SUPREME COURT DECISIONS ON THE ISSUE OF RULE 59(e) AND RULE 60(b) APPLICATION.

Petitioner first contends that the Courts of Appeals of the Third, Fourth and Seventh Circuits have held that a trial court may alter or amend a Final Judgment more than ten days after it was rendered without reserving such jurisdiction and without a timely

Rule 59(e) motion from a party. (Petition p. 18). Petitioner misconstrues the three cases it cites for this proposition. In the first case, *Glick v. White Motor Co.*, 317 F. Supp. 42 (E.D. Pa. 1970) *aff'd*, 458 F.2d 1287 (3rd Cir. 1972), the district court held that where prejudgment interest was a matter of right pursuant to statute, and where the judgment was silent as to such interest, plaintiff's untimely rule 59(e) motion to amend the judgment to include prejudgment interest was deemed to be a rule 60(a) motion to correct a clerical mistake. Awarding interest in accordance with statutory law was not equivalent to reversing a substantive portion of the judgment. Thus, because a Michigan statute provided "interest shall be allowed on any money judgment recovered in a civil action . . ." and because the plaintiff in *Glick* recovered a money judgment, the award of prejudgment interest was a purely ministerial act within rule 60(a) and not a discretionary act within rule 59(e). 317 F. Supp. at 45.

In the instant case, Petitioner has not maintained that the district court's action in reversing its ruling of exceptional case was "a matter of right" or a "clerical mistake," nor could such argument be reasonably made. The plain language of rule 60(a) makes it clear that the rule was not promulgated as a vehicle for reversing the substantive aspects of a judgment. The *Glick* court's analysis of whether to apply rule 59(e) or 60(a), therefore, is inapplicable to the instant case. Likewise, Petitioner's reliance on *United States v. Hollis*, 424 F.2d 188 (4th Cir. 1970), is inexplicable because, unlike Petitioner herein, the Plaintiff in *Hollis* apparently filed a timely rule 59 motion. *Id.* at 190.

Petitioner's reliance on *Continental Casualty Company v. American Fidelity & Casualty Company*, 186 F. Supp. 173, (S.D. Ill. 1959) *aff'd*, 275 F.2d 381 (7th Cir. 1960), is equally misplaced. In *Continental*, the district court entered judgment in the amount of $10,525.00 against the defendant, after which defendant filed its *timely* Motion to Alter or Amend the Judgment. 186 F. Supp. at 175 (emphasis added). Although the court increased the damages awarded against defendant, the defendant did not appeal the increased award made pursuant to its timely Rule 59(e) Motion and thus the circuit court did not address the issues addressed in the instant case by the appellate court below.

Petitioner next contends that the holding below conflicts with the holding in *Oliver v. Home Indemnity Company*, 470 F.2d 329 (5th Cir. 1972). In *Oliver*, a third party defendant filed a Motion for Reconsideration of the district court's decision, alleging that "relatively recent Texas decisions had changed the law applicable" to the court's earlier ruling. 470 F.2d at 330. The district court held the motion to be within the provisions of rule 60(b)(1), interpreting rule 60 so that "mistake" encompassed judicial mistakes in applying the appropriate law. 470 F.2d at 330. *Oliver* is consistent with the appellate opinion in the instant case because first, no relatively recent decisions have changed the law applicable to the district court determination herein. Second, neither Petitioner nor the courts suggested below that rule 60 should apply to the district court's reversal. Third, the reversal was not subject to a rule 60 motion because it reversed a substantive portion of the judgment.

Furthermore, contrary to its claim on page 20 of the Petition, Petitioner did not "timely challeng[e] [the district court] judgment under rule 60(b)." Petitioner's Motion and Memorandum for Attorneys' Fees and Costs never mentioned rule 60 and the district court in its Amended Final Judgment made no reference whatsoever to rule 60. Moreover, the appellate court below pointed out that it did "not consider the district court's action herein, nor did the court so indicate or the parties contend, to fall within other provisions of Rule 59 or Rule 60." (app. p. 128a).

Petitioner cites a string of cases in support of the proposition that "district courts are not confined by Rule 59(e) in the correction of errors before appeal." (Petition p. 21). The opinion below contains nothing that would contradict or conflict with this proposition. Petitioner failed to argue that its Motion and Memorandum for Attorneys' Fees and Costs was a rule 60(b) motion for relief from judgment. However, even if Petitioner had made such an argument it would have been unsuccessful. Regardless of labeling, a motion seeking substantive modification of a judgment, such as Petitioner sought, must be considered a rule 59 motion.

Petitioner objects to the appellate court's reliance on *Hidle v. Geneva County Board of Education*, 792 F.2d 1098 (11th Cir. 1986) *cert. denied*, 479 U.S. 1088 (1987), and *Burnam v. Amoco Container Company*, 738 F.2d 1230 (11th Cir. 1984). The appellate court's interpretation of these two cases was correct. Despite Petitioner's bare statement that such interpretation and reliance was erroneous, Petitioner has not cited any Eleventh Circuit case, nor that of any other cir-

cuit, that the Federal Circuit's interpretation conflicts with, notwithstanding Petitioner's claims that such a conflict exists.

Petitioner also fails to recognize the test courts use to determine whether a motion, regardless of its title, comes within the parameters of rule 59(e). All the cases cited by Petitioner agree that regardless of labeling, a motion seeking substantive modification of a judgment is a rule 59 motion. *Osterneck v. E. T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987), *cert. granted sub nom. Osterneck v. Ernst & Whinney*, 108 S. Ct. 2032 (1988); *Lucas v. Florida Power & Light Company*, 729 F.2d 1300 (11th Cir. 1984). Both the *Osterneck* and *Lucas* opinions refer to the decision of this Court in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982).

In *White*, this Court resolved a conflict among the circuits on the application of Rule 59(e). Petitioner is trying to revive this conflict where no conflict exists. The cases Petitioner cites to support its notion of conflict do not involve substantive changes in the judgments but are merely trial court awards consistent with their final judgments. In the instant case, the trial court's amended judgment was *not* consistent with its earlier judgment, but was a reversal of an explicit ruling. No conflict exists because unlike *White* and its progeny, the district court here "reversed the part of its judgment relating to exceptional case." (app. p. 129a). An "exceptional case" ruling is an integral substantive part of a final judgment and a ruling that a case is exceptional is a prerequisite to an award of attorney's fees. Thus, the trial court's reversal of its exceptional case finding was a "sub-

stantive modification" of the original judgment subject to rule 59 and therefore had to be initiated within ten days.

Petitioner's final argument for this issue claims that the appellate court "ignored precedent" such as *S. C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198 (Fed. Cir. 1986). *S. C. Johnson & Son, Inc.* was not a precedent case for the instant case. The ruling in *S. C. Johnson & Son, Inc.* supports the proposition that a district court must explain a ruling that a case is not exceptional when it also makes a specific finding of willful infringement. 781 F.2d at 201. In the instant case, the district court did not make a finding of willful infringement and in fact specifically found that Petitioners did *not* infringe the patents in question (app. p. 69a) and Respondents did not appeal that ruling. Therefore, the district court sufficiently explained its no exceptional case ruling because there was no willful infringement. Thus, no conflict exists between the holding in *S. C. Johnson & Son, Inc.* and the appellate ruling herein.

This Petition should be denied because Petitioner has never before characterized its Motion of November 5, 1986 as a rule 60(b) Motion. The argument Petitioner asserts in support of its request for a Writ of Certiorari is being made for the first time in its Petition. No conflict can exist among the circuits on the issue as Petitioner suggests, when its arguments were never presented to the circuit court below for a decision. Furthermore, Petitioner's motion cannot come within the realm of rule 60(b) because Petitioner was seeking a substantive modification of the judgment and thus had to meet the ten (10) day time

restriction of rule 59, which even under its own rendition of the facts it failed to meet.

III. THE APPELLATE COURT'S DECISION IS CONSISTENT WITH ALL OTHER FEDERAL COURTS OF APPEALS AND WITH SUPREME COURT DECISIONS ADDRESSING THE DUTY OF AN APPELLATE COURT TO VACATE A LOWER COURT'S JUDGMENT WHEN THE JUDGMENT IS UNREVIEWABLE FOR MOOTNESS.

The appellate court's decision in the instant case accords with *Karscher v. May*, 108 S. Ct. 388 (1987); *Burke v. Barnes*, 107 S. Ct. 734 (1987); *United States Department of Treasury v. Galioto*, 477 U.S. 556 (1986); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). This line of cases stands for the proposition that when mootness of an appeal prevents review of an adverse lower court decision, and mootness was not caused by intentional activity of the appellant, the appellate court should vacate the lower court judgment. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. (Footnote omitted).

The Petitioner tries to create conflict by citing *United States v. Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199 (1968). In *Concentrated Phosphate*, the Supreme Court states the appropriate test for mootness in an antitrust case, reaffirming its earlier rulings that "mere voluntary cessation of allegedly illegal conduct does not moot a case." *Id.* at 364. The *Concentrated Phosphate* case addresses the

construction of the Webb-Pomerene Export Trade Act and fails to support Petitioner's claim that the Supreme Court held "a case which becomes moot while on appeal requires dismissal of that appeal, not vacating the District Court judgment from which the appeal was taken." (Petition p. 27). Thus, despite Petitioner's assertions, no conflict exists between the court of appeals decision in the instant case and the *Concentrated Phosphate* case.

Petitioner also alleges that conflict exists between the decision below and *Mills v. Greene*, 159 U.S. 651 (1895). In *Mills*, Lawrence Mills sought the right to vote in an election at an upcoming state constitutional convention and was denied. Mr. Mills appealed to the United States Supreme Court where his case was dismissed as moot because the convention had assembled and the election had passed before his appeal could be heard. Petitioner's reference to *Mills* was a citation without analysis, thus Respondents are at a loss to detect the conflict that Petitioner claims was present with *Mills v. Greene*.

Petitioner next relies on and in fact misstates the dissenting opinion in *Cover v. Schwartz*, 133 F.2d 541 (2nd Cir. 1942), *cert. denied*, 319 U.S. 748 (1943). Petitioner claims "the *Cover* court recognized any notion of vacating the district court's judgment of invalidity for mootness would be 'so fine an opportunity generally for a defeated plaintiff (the patentee) that such a result is really unthinkable' 133 F.2d at 549." What Judge Clark actually said in his *dissent* was "Now, of course, dismissal [not vacation] of the action would be such a trap for the Defendant and so fine an opportunity generally for a defeated plaintiff to get away from the burden of an adverse judgment -

that such a result is really unthinkable." 133 F.2d at 549. Judge Clark in his dissent made no reference to the notion of vacating the district court's judgment of invalidity for mootness. Furthermore, the dissent disagreed with the majority on the very point Petitioner cites. The appeal was dismissed. 133 F.2d at 545.

The majority opinion in *Cover* held that where no unfairness to an appellee resulted, it was appropriate to merely dismiss a moot appeal. The majority in *Cover* distinguished *Electrical Fittings Corporation v. Thomas & Betts Company*, 307 U.S. 241 (1939). In *Electrical Fittings*, "the Supreme Court held that the decree of validity, in the absence of infringement, was improper, and if not vacated, would stand as an adjudication against the Defendants; accordingly, it held that they were entitled to have that portion of the decree eliminated . . . ." 133 F.2d at 547. In the instant case, as in *Electrical Fittings*, the district court entered a decree of validity in the absence of infringement. Thus, no conflict exists between the *Cover* case and the instant case because the *Cover* court addressed a different situation than was present in *Electrical Fittings* or the instant case.

Petitioner claims that the Federal Circuit's decision conflicts with the decisions of the District of Columbia Circuit and the Ninth Circuit. The first case cited is *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984), wherein Petitioner claims appellant caused dismissal of its own appeal and was left in the same position as if no appeal had been taken. (Petition p. 29). Contrary to Petitioner's allegations, however, what happened in *Center for Science* was that the Treasury Department promulgated a new

rule, superceding the old rule at issue which had been found defective by the district court. Enactment of a superceding rule thus rendered moot any controversy over the old rule's prospective application. 727 F.2d at 1164.

In *Center for Science*, the circuit court vacated that portion of the district court order ruling that the old rescinded Treasury Department regulation set a new date for the regulation to become effective. *Id.* at 1165. However, where review was prevented by the intentional enactment of a superceding regulation by the Treasury Department, the circuit court let stand the district court's decision regarding the Treasury Department's prior regulation. *Id.* at 1166. In the instant case, Respondents' passive role is not analogous to the affirmative or intentional acts of the Treasury Department in *Center for Science*.

In the second case, *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), Petitioner claims conflict with the appellate court below. When an appeal was moot because the appellant and appellee reached a post-judgment settlement, the *Ringsby* court recognized an exception to the rule that when an appeal has been rendered moot it is the duty of the appellate court to vacate the lower court judgment. Petitioner and Respondents do not come within this "settlement" exception so that the instant case does not conflict with the *Ringsby* case.

A second exception to the *Munsingwear* doctrine of vacating lower court judgments when an issue becomes moot on appeal was relied on by Petitioner and mentioned in a footnote in *Zemansky v. United States Environmental Protection Agency*, 767 F.2d

569, 573 n.3 (9th Cir. 1985). The *Zemansky* court noted "where the appellant ceases to press an appeal, the appeal does become moot, but this does not retroactively moot the controversy originally presented to the district court." *Id.* Respondents, having pressed their appeal, are not within the exception expressed by the *Zemansky* notation.

In concluding its argument on the mootness issue, Petitioner complains of the circuit court's reliance on *Fonar Corporation v. Johnson & Johnson*, 821 F.2d 627 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 751 (1988), and *Vieau v. Japax, Inc.*, 823 F.2d 1510 (Fed. Cir. 1987). Petitioner asserts that those cases "involved issues favorable to the appealing party, which issues the appealing party did not appeal." Notwithstanding Petitioner's self-evident observation, no conflict exists between the decisions in *Fonar* and *Vieau* and the instant appellate decision.

Although Plaintiff has cited a number of interesting cases addressing some aspect of mootness, Petitioner has failed to set forth any case that conflicts with the appellate decision below. The appellate court decision is in accord with the decisions of this Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, (1950), and *Duke Power Company v. Greenwood County, S. C.*, 299 U.S. 259 (1936), wherein the Court noted it is common to "vacate a judgment to prevent a judgment, unreviewable because of mootness, from spawning any reviewable consequences." Not having presented any actual conflict between the judgment of the court below and any other circuit or Supreme Court case, the Petitioner should be denied its Petition for a Writ of Certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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